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Report of the International Court of Justice

Note verbale dated 9 January 2002 from the Permanent Mission of Costa Rica to the United Nations addressed to the Secretary-General

The Permanent Mission of Costa Rica presents its compliments to the Secretary-General of the United Nations, in his capacity as depositary of the declarations provided for in Article 36, paragraph 2, of the Statute of the International Court of Justice, and has the honour to transmit herewith a letter from Mr. Roberto Rojas, Minister for Foreign Affairs and Worship of Costa Rica, whereby the Government of Costa Rica presents a formal objection to the "reservation" formulated by the distinguished Government of Nicaragua to its acceptance of the compulsory jurisdiction of the Court, communicated by its note MRE/DM-/1081/10/01 and transmitted to the Member States by notification C.N.1157.2001.TREATIES-1.

The Permanent Mission of Costa Rica would be grateful if this note and the letter annexed hereto could be transmitted to the secretariat of the International Court of Justice and to the States parties to its Statute, and if they could be issued as a document of the General Assembly under the agenda item relating to the consideration of the report of the International Court of Justice.

The Permanent Mission of Costa Rica takes this opportunity to convey to the Secretary-General the renewed assurances of its highest consideration.

* Reissued for technical reasons.

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Annex to the note verbale dated 9 January 2002 from the Permanent Mission of Costa Rica to the United Nations addressed to the Secretary-General

18 December 2001

I have the honour to write to you in your capacity as depositary of the declarations provided for in Article 36, paragraph 2, of the Statute of the International Court of Justice, with reference to note MRE/DM-/1081/10/01, which the Minister for Foreign Affairs of Nicaragua transmitted to you on 24 October 2001.

On 24 September 1929, the Republic of Nicaragua recognized, unconditionally, the compulsory jurisdiction of the Permanent Court of International Justice. That declaration was deemed transferable to the jurisdiction of the International Court of Justice by virtue of Article 36, paragraph 5, of the Statute of the Court. On various occasions, Nicaragua has used this optional declaration to bring proceedings before the International Court of Justice. In the *Military and Paramilitary Activities In and Against Nicaragua* case between Nicaragua and the United States of America, the Court found that this declaration was valid.[1]

The above-mentioned note from the Minister for Foreign Affairs of Nicaragua, dated 24 October 2001, represents a casuistic attempt by the Nicaraguan Government to modify its voluntary declaration of unconditional acceptance of the compulsory jurisdiction of the International Court of Justice as follows:

> "Nicaragua will not accept [as from 1 November 2001] the jurisdiction or competence of the International Court of Justice in relation to any matter or claim based on interpretations of treaties or arbitral awards that were signed and ratified or made, respectively, prior to 31 December 1901".

The Government of Costa Rica considers that this purported "reservation" is not permissible for the following reasons: (a) public international law does not recognize the right to formulate reservations *a posteriori* to unconditional declarations of acceptance of the jurisdiction of the International Court of Justice; (b) Nicaragua is unable to formulate this "reservation" by virtue of its unilateral declarations before the same Court with respect to the nature of its acceptance of compulsory jurisdiction and the possibility of modifying it; (c) even if this reservation were permissible, which it is not, the lack of a reasonable time period for its entry into force renders such a "reservation" contrary to the principle of good faith in international relations. In addition, it is worth noting that the foregoing is supported by the provision of the Vienna Convention on the Law of Treaties contained in article 2, paragraph 1 (d), on the meaning of a reservation. Moreover, the provision contained in article 20, paragraph 3, of that Convention should also be borne in mind with respect to the formulation of a reservation to a treaty which is a constituent instrument of an international organization.

I must point out that the note to which my Government objects was not transmitted spontaneously. Rather, it represents a reaction to the fact that my Government has included an item in the national budget to cover the cost of the

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[1] *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, I.C.J. Reports 1984*, p. 441, para. 110.

possible filing of a claim by Costa Rica against Nicaragua before the International Court of Justice for its failure to abide by the provisions agreed upon by both countries in the Cañas-Jerez Treaty of 1858 and the Cleveland Award of 1888. Both instruments were signed and ratified during the period which Nicaragua now seeks to exclude from the Court's jurisdiction by means of the above-mentioned reservation. However, in its haste, it has overlooked the fact that, on 21 February 1949, the Government of Nicaragua signed a Pact of Amity with Costa Rica. Article III of that instrument reflects the commitment to apply the American Treaty on Pacific Settlement. Nicaragua has also failed to consider that, on 9 January 1956, as a corollary to the 1949 Pact of Amity, Nicaragua and Costa Rica signed, at the Pan American Union in Washington, an agreement to facilitate and expedite traffic on the San Juan River within the terms of the Treaty of 15 April 1858 and its interpretation given by arbitration on 22 March 1888. Both instruments were ratified in due course by both countries. The purported reservation also fails to include the judgement pronounced on 20 September 1916 by the Central American Court of Justice. The 1916 judgement of the Central American Court of Justice, the 1949 Pact of Amity and the 1956 agreement reinforce a set of legal rules which must be respected.

1. International law does not give Nicaragua the right to formulate reservations *a posteriori* to its unconditional declaration of acceptance of the jurisdiction of the International Court of Justice

In the judgement on the jurisdiction of the International Court of Justice pronounced in the *Military and Paramilitary Activities In and Against Nicaragua* case, the Court indicated that States could not modify their acceptance of the Court's compulsory jurisdiction as they pleased, but were bound by the terms of their declarations.[2]

The Court noted, in particular, that the right to terminate declarations with indefinite duration was far from established in international law.[3]

Nicaragua itself has recognized that contemporary international law does not give States the power to modify unilaterally their optional declarations of acceptance of the compulsory jurisdiction of the International Court of Justice when such declarations are unconditional.

In its written pleadings in the *Border and Transborder Armed Actions* case between Nicaragua and Honduras, Nicaragua stated categorically that a State bound by an optional declaration could not modify or denounce that declaration.[4] Nicaragua claimed that the declaring State was bound by the terms of the optional declaration and that, by virtue of the principle of good faith, it could not seek to disengage unilaterally from the obligations it had acquired in making that declaration.[5]

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[2] Ibid., p. 418, para. 59.

[3] Ibid., p. 420, para. 63: "But the right of immediate termination of declarations with indefinite duration is far from established (...)".

[4] *Counter-memorial of Nicaragua (Jurisdiction and Admissibility), I.C.J. Pleadings, Border and Transborder Armed Actions (Nicaragua v. Honduras)*, vol. I, p. 297, para. 54.

[5] Ibid., p. 298, para. 59.

Nicaragua argued that that rule arose from an analogous application of the customary principles of the law of treaties. Nicaragua indicated that the principles incorporated into the Vienna Convention on the Law of Treaties were applicable to voluntary declarations of acceptance of the Court's jurisdiction in respect of denunciation and reservation, meaning that such declarations could not be modified unless the declaring State had previously reserved that right.[6] Lastly, Nicaragua maintained that State practice showed that a State could modify an optional declaration only when it reserved the right to do so at the time it made the original declaration.[7]

In its written pleadings in the jurisdictional phase of the *Military and Paramilitary Activities* case, Nicaragua argued that the legality of a purported modification depended on the intention of the declaring State at the time of making the original optional declaration. If the declaring State did not expressly reserve the right to make modifications, that State did not have the power to change its declaration or to formulate reservations.[8]

Insofar as the declaration of acceptance of the compulsory jurisdiction of the International Court of Justice made by Nicaragua in 1929 does not include any conditions or time limits, nor does it expressly reserve the right to modify its content, Nicaragua has no right to formulate reservations to its acceptance of the Court's compulsory jurisdiction.

2. Nicaragua, by virtue of its public unilateral declarations before the Court with respect to the nature of its optional declaration and the possibility of modifying it, cannot formulate any reservations

In a number of unilateral declarations, Nicaragua has recognized that its own declaration of acceptance of the Court's compulsory jurisdiction cannot be modified in any way.

In its written pleadings in the *Military and Paramilitary Activities* case, Nicaragua pointed out that its 1924 declaration could not be terminated or modified without prior notice and that any withdrawal or modification of the declaration must be based on the principles of the law of treaties.[9] What is more, Nicaragua indicated categorically that the assumption that its declaration could be modified without prior notice was unfounded in the law relating to consensual legal obligations arising from optional declarations.[10] In the same case, Nicaragua argued against the possibility of unilaterally modifying declarations of acceptance of the Court's compulsory jurisdiction. Nicaragua based its arguments both on the writings of the most distinguished legal experts[11] and on considerations of principle. Nicaragua noted that the existence of a universal right of unilateral modification of optional

[6] Ibid., p. 304, para. 82.

[7] Ibid., p. 303, paras. 78 and 79.

[8] *Memorial of Nicaragua (Questions of Jurisdiction and Admissibility), I.C.J. Pleadings, Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, vol. I, p. 393, para. 122.

[9] Ibid., p. 398, para. 142.

[10] Ibid., p. 397, para. 140.

[11] Ibid., pp. 394 and 396-397, paras. 127, 130 and 137.

declarations would violate the system of optional clauses in the Statute and would essentially eliminate the compulsory nature of the Court's jurisdiction.[12]

These arguments demonstrate both Nicaragua's intention that its 1929 declaration of acceptance of the Court's compulsory jurisdiction should not be subject to any modification or denunciation and its repeated contention that the unilateral modification of such declarations, in the absence of a previous reservation, is contrary to international law. This acknowledgement of the legal situation is binding on Nicaragua. Under the principles of estoppel and good faith, Nicaragua cannot, at this time, reverse those positions.

Accordingly, Costa Rica considers that Nicaragua cannot now claim to modify unilaterally its unconditional acceptance of the voluntary jurisdiction of the Court by means of a purported "reservation".

3. Even if Nicaragua had the right to formulate a reservation to its optional declaration, which it does not, the lack of a reasonable time period for its entry into force renders such a "reservation" null and void

In the *Military and Paramilitary Activities* case, the International Court of Justice indicated that, while the right to denounce declarations without limit of time was far from established in international law, if such a right existed, then any denunciation would, by analogy with the law of treaties, have to provide for a reasonable time period before it entered into force.[13] This principle applies, by analogy, to the introduction of changes to the voluntary acceptance of the Court's compulsory jurisdiction. Consequently, even if Nicaragua could modify its optional declaration by means of a reservation, which is not the case, then such a modification would have to be subject to a reasonable time period, by virtue of the principle of good faith.

It should be noted that, in the *Border and Transborder Armed Actions* case, Nicaragua argued that only a period of at least 12 months could be considered reasonable for any modification of a declaration of voluntary acceptance of the Court's jurisdiction.[14]

Nicaragua's purported "reservation", which my Government has analysed in this note, provides for a period of only eight days from the time of its signature by the President of Nicaragua to the time of its purported entry into force. Even if Nicaragua were legally in a position to modify its acceptance of the Court's compulsory jurisdiction, which it is not, a period of eight days would not meet the requirement of a reasonable time period for the entry into force of such a modification.

What is more, Nicaragua, by virtue of its declarations in the *Border and Transborder Armed Actions* case, would be obligated, under the principles of good faith and estoppel, to provide for a period of at least 12 months before the purported

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[12] Ibid., pp. 394-395, para. 131.

[13] *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, I.C.J. Reports 1984*, p. 420, para. 63: "... observed that from 6 to 9 April would not amount to a 'reasonable time' ".

[14] *Counter-memorial of Nicaragua (Jurisdiction and Admissibility), I.C.J. Pleadings, Border and Transborder Armed Actions (Nicaragua v. Honduras)*, vol. I, pp. 304 and 307-308, paras. 82, 83 and 96.

"reservation" could enter into force. Accordingly, the purported "reservation" formulated on 24 October 2001 cannot be considered to meet the minimum requirements imposed by the principle of good faith.

Jurisdiction of the Court and the Pact of Bogotá

Moreover, in the case of Nicaragua, as in the case of any other Latin American State party to the Pact of Bogotá, the denunciation of the Statute of the Court would not disengage it from the obligation to recognize the competence of that Court as a respondent, for the following reason:

In April 1948, the American Treaty on Pacific Settlement, better known as the Pact of Bogotá, was adopted. Costa Rica ratified it on 27 April 1949, and Nicaragua, in turn, ratified it on 26 July 1950. Accordingly, the Pact of Bogotá has been in force between Costa Rica and Nicaragua as from the latter date.

The Pact contains a definitive declaration of recognition of the compulsory jurisdiction of the Court for all disputes of a juridical nature among the States parties to the Pact. Article XXXI of the Pact says:

> "In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, the High Contracting Parties declare that they recognize in relation to any other American State, the jurisdiction of the Court as compulsory *ipso facto*, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them ...".

Therefore, since both Costa Rica and Nicaragua are ratifying parties to the Pact of Bogotá, there can be no doubt that both parties have recognized the compulsory jurisdiction of the International Court of Justice to settle any legal dispute between them.

The above-mentioned article XXXI has the legal effect of transforming the vague juridical relations arising from unilateral declarations made by the parties under the optional clause into *contractual relations which have the force and stability characteristic of an obligation arising directly from a treaty*.

Eduardo Jiménez de Aréchega, a distinguished Uruguayan jurist who had the honour to serve as President of the International Court of Justice, maintained that there were substantial differences between the exercise of the optional clause and the fact of being a party to a convention. In an opinion which he provided to Costa Rica in his capacity as adviser to our country in the 1986 *Nicaragua v. Costa Rica* case, he gave the following explanation:

> "The fundamental difference between the recognition of the Court's jurisdiction expressed by the parties to the Pact of Bogotá and that expressed by other States under the optional clause is as follows: (a) once the Pact of Bogotá has been ratified by an American State, the recognition of the Court's jurisdiction may be withdrawn only by denunciation of the Pact itself, which must be effected with at least one year's notice; and (b) the States which ratified the Pact could have introduced reservations to their recognition of the Court's jurisdiction if they had done so at the time of signature. As they did not do so with respect to the recognition of the compulsory jurisdiction of the

Court, *article XXXI became a mechanism for accepting fully the Court's jurisdiction, and is completely different in this regard from the very conditional acceptance which the majority of States have expressed through the application of the optional clause.*

"From these substantial differences, it follows that the American States parties to the Pact of Bogotá *have established a legal system among themselves whereby the optional clause has been replaced by the categorical declaration contained in article XXXI of the Pact.* The declarations made by American States in exercise of their prerogative under Article 36, paragraph 2, of the Statute of the Court only have the legal effect of establishing the tenuous relations under that clause exclusively with States *which are not Contracting Parties to the Pact of Bogotá*, but not the contractual obligation created by article XXXI to recognize, with the force of a treaty, the obligation to grant the American States parties to the Pact of Bogotá the right to bring claims against other American States before the Court at The Hague".

Consequently, even if Nicaragua's Presidential Decree revoking the unilateral declaration of 1929 in which Nicaragua recognized the jurisdiction of the Court at The Hague to settle legal disputes with any other State having expressed the same recognition were valid, which it is not, *that nation would still be bound to recognize the competence of the Court at The Hague to settle legal disputes with any other Latin American State party to the Pact of Bogotá.*

In light of the above, so long as the Pact of Bogotá is in force, Nicaragua cannot deny the competence of the International Court of Justice to hear and settle any legal dispute brought before it by Costa Rica.

For all the foregoing reasons, the Government of Costa Rica hereby presents a formal objection to the "reservation" formulated by the Government of Nicaragua, and declares that, for all intents and purposes, it will consider such reservation to be non-existent.

I should be grateful if you would transmit this document to the secretariat of the International Court of Justice and to the States parties to its Statute. Likewise, I should be grateful if you would have it circulated as a document of the General Assembly under the agenda item relating to the consideration of the report of the International Court of Justice.

(*Signed*) Roberto **Rojas**
Minister for Foreign Affairs and Worship of Costa Rica